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February 5, 2007

BY HAND DELIVERY

Arnetta McRae, Chair
Delaware Public Service Commission
861 Silver Lake Boulevard
Cannon Building, Suite 100
Dover, Delaware 19904

Re: In the Matter of Integrated Resource Planning for the Provision of
Standard Offer Supply Service by the Delmarva Power & Light Company
Under 26 Del. C. Section 1007(c) & (d): Review and Approval of the
Request for Proposals for the Construction of New Generation Resources
Under 26 Del. C. Section 1007(d), PSC Docket No 06-241

Dear Chairperson McRae:

NRG Energy, Inc. ("NRG") respectfully submits the following comments on the **Response to Request for Access to Confidential Information and Motion for Entry of a Protective Order** (hereinafter "Motion") filed by Professor Jeremy Firestone which is on the Delaware Public Service Commission's (the "Commission") agenda for consideration at its regularly scheduled meeting on Tuesday, February 6, 2007. It is NRG's view that Rule 11(e) of the Commission's Rules of Practice and Procedure does not apply to Professor Firestone as he is not charged with evaluating the bid in this matter, does not have a recognized need for access to the confidential information, and he does not have an interest which is not already adequately represented by the government agencies with access to the information in their role as evaluators of the bids.

As a general rule, responses to a government agency's request for proposal "are public records subject to the provisions of the [Delaware] Freedom of Information Act", unless the bids contain trade secrets or confidential or privileged information, in which case they may be redacted. *Computer Co. v. Division of Health & Social Services*, 1989 WL 108427, at p. 3

(Del. Ch. 1989)(Attached hereto as Exhibit A); See also Delaware Attorney General Opinion 77-037 (Dec. 28, 1977)(Attached hereto as Exhibit B); and Delaware Attorney General Opinion 00-IB15 (October 4, 2000)(Attached hereto as Exhibit C). As a result, the portions of NRG's bid submitted in Docket No. 06-241 that contain "trade secrets or confidential or privileged information" are not subject to public disclosure.

Relying on the authorities cited above, and with the expectation that the other bidders and general members of the public would not have access to NRG's trade secrets, privileged or confidential information, on January 24, 2007, NRG submitted a "public" version of their bid redacting such information. The redacted (hereinafter "Non-Public") information in the bid proposal generally consisted of:

- Information that if disclosed would cause substantial harm to the competitive position of NRG and its subsidiaries – in and beyond Delaware;
- Information regarding formulas, patterns, devices or compilations of information used in NRG's business which gives NRG an opportunity to obtain an advantage over competitors who do not know such information, including but not limited to information in the category of formulas for chemical compounds, processes of manufacturing, treating or preserving materials, patterns for machines or other devices, and a list of potential or current customers and consultants.
- Non-public information that contains NRG's assets, product pricing, profits and losses, stock holdings, loans and collateral (including as proposed for the Indian River IGCC Project); and
- Information regarding NRG's technical approach to its bid, including but not limited to details about NRG's processes, operations and style of work.

In his motion, Professor Firestone concludes that he has Party status in Docket 06-241 and therefore pursuant to Rule 11(e) of the Commission's Rules of Practice and Procedure he is entitled to the redacted portions of NRG's public bid. In reaching this conclusion, Professor Firestone argues that Rule 11(e) gives any party to any proceeding – which is defined as any matter assigned a Docket Number before the Commission – the right to have the confidential information of any other party to that same proceeding pursuant to a confidentiality agreement or the issuance of a protective order. It is NRG's position that such a broad reading was not intended by the Commission when Rule 11 was adopted and that such a broad reading is not permissible under Delaware law.

As Conectiv Energy's ("Conectiv") January 12, 2007 letter to Robert Howatt noted, Rule 11(e) most logically applies only to parties in contested cases before the Commission. This is a rational interpretation of the Commission's Rules of Practice and Procedure given the rights and respective interests of parties in a contested case. Professor Firestone is a member of the public admittedly very interested in the RFP process, but he does not have a designated role in the evaluation of the bids, and therefore he does not have the need or right under Rule 11 to access proprietary, confidential bidder information which was given by statute to the four state agencies assessing the responses to the RFP.

The Electric Utility Retail Customer Supply Act of 2006 ("EURSCA") vested the sole authority to evaluate the bids to the Commission, the Director of the Office of Management and Budget, the Controller General and the Energy Office (collectively the "Four Agencies"). EURSCA makes clear that control of the entire RFP process rests with the Four Agencies that are specifically identified in EURSCA. Professor Firestone and other interested observers do not have an evaluative role under EURSCA, the Orders issued by the Commission, or any other action by the Commission in Docket 06-241. *See generally*, 26 Del. C. §1007(d); and §§2.5, 2.6 and 6.2 of November 1, 2006 Final RFP. From the outset of the RFP process, at the August 18, 2006 workshop regarding the RFP process, which Professor Firestone attended, it was stated that the Four Agencies would evaluate the respective bids and the public would then have the opportunity to comment on the public report of that evaluation. August 18, 2006 Transcript at page 24, ¶¶ 8-13; 14-19. And as the government agencies entrusted and legislatively charged with the evaluation of the bids, the Four Agencies are uniquely qualified to adequately represent the public's interest – including Professor Firestone's – in the evaluation process. *See* Commission Rules of Practice and Procedure Rule 21(a) (petitioner for Party status must demonstrate a particularized interest in the outcome of the proceeding and show why other participating parties will not adequately represent that interest).

The consequence of Professor Firestone's reading of Rule 11(e) would be to provide access to proprietary, confidential bid information to any person who has entered comments in this docket and would allow all bidders to view the bids of their competitors. This result is contrary to established law – which permits competitors in a bid process to only have redacted versions of competing bids. *Computer Co. v. Division of Health & Social Services*, 1989 WL 108427, at p. 3 (, Del. Ch. 1989); *See also* Delaware Attorney General Opinion 77-037 (Dec. 28, 1977); and Delaware Attorney General Opinion 00-IB15 (October 4, 2000). And it inevitably severely undermines future RFPs before the Commission since bidder information will not be protected -- and consequently bidders will not bid.

NRG redacted information which if disclosed would cause substantial harm to the competitive position of NRG and its subsidiaries. A holding that under all these circumstances allows members of the public to access this information and then requires NRG to rely on enforcement of agreements with members of the public, or an order of the Commission designed

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to protect this information, places a huge, risky and unnecessary burden on NRG and the other bidders. As a result, NRG respectfully requests that Professor Firestone's Motion be denied.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Houghton", with a long horizontal flourish extending to the right.

Michael Houghton

MH/fv

Enclosures

cc: Commissioner Jeffrey Clark
Commissioner Joann Conaway
Commissioner Jaymes B. Lester
Commissioner Dallas Winslow
Philip J. Cherry
Interested Parties in PSC Docket No. 06-241 (via E-mail)

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